United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

Original

76-7612

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P/S

In The

United States Court of Appeals

For The Second Circuit

LOCAFRANCE U.S. CORPORATION,
Plaintiff-Appellant,

-against-

INTERMODAL SYSTEMS LEASING, INC., DANIEL H. OVERMYER, SHIRLEY OVERMYER, JOHN OVERMYER, ELIZABETH OVERMYER, EDWARD OVERMYER, BARBARA STRANG AND "JOHN DOE", THAT NAME BEING FICTITIOUS, THE TRUE NAME OF THE DEFENDANT BEING UNKNOWN TO PLAINTIFF AND THE PERSON INTENDED BEING TRUSTEE f/t/b OF DEFENDANTS JOHN OVERMYER, ELIZABETH OVERMYER, EDWARD OVERMYER AND BARBARA STRANG,

Defendants-Appellees.

On Appeal from a Judgment Entered in the United States District Court for the Southern District of New York

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

LOCAFRANCE submits this Brief in reply to the various legal issues and certain inaccurately stated facts contained in the Brief of Defendants-Appellees.

POINT I

LOCAFRANCE IS NOT PRECLUDED FROM RAISING THE ISSUE OF THE EFFECT OF THE RELEASE

Defendants-Appellees urge that LOCAFRANCE is barred from addressing the issue as to the effect of the release because that issue was allegedly not discussed in the District Court. Such a position is factually inaccurate and materially distorting.* Mr. PAUL SIEGE, Vice-President of LOCAFRANCE, in his affidavit in opposition to the motion to dismiss, stated:

> "It should also be pointed out that at no time during the negotiations for the settlement agreement did LOCAFRANCE agree to release forever any potential liability of Defendants for fraud. Since these issues were not wholly relevant to the Chicago action and since LOCAFRANCE did not truly focus on this aspect, the settlement agreement did not address itself to that matter." [A-154a, 155a].

Further, in LOCAFRANCE's memorandum of law in opposition to the motion to dismiss it is stated:

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* It should be noted that in the memorandum of law in support of the motion to dismiss, the issue of the release is mentioned only as an aside and solely in the context of Defendants-Appellees claim of an accord and satisfaction. [A-123a]. On that point LOCAFRANCE more than amply substantiated that the settlement agreement (of which the release was an element) was conditioned on performance. [A-170a].

> "It is clear from Mr. SIEGE's affidavit (which at no point is disputed by Defendants) that there never existed an expressed intent to discharge the obligations upon which the agreement was predicated without performance of the agreement by Defendants." [A-170a].

There are, of course, other concrete examples of the issue as to the effect of the release having been raised in the District Court. [A-332a, 333a; A-23a, 24a; A-354a]

Yet, despite the foregoing, it is suggested, let alone seriously asserted, that LOCAFRANCE is barred from addressing this issue on appeal.* It is only where neither the pleadings, the moving papers, the opposing papers, any argument of counsel nor the consideration of the Court contain any reference whatsoever to an issue, that such an issue is deemed inappropriate for consideration on appeal. First National Bank of Cincinnati v. Pepper, 454 F. 2d 626 (2d Cir. 1972); United States v. L.N. White & Company, 359 F. 2d 703 (2d Cir. 1966); and Ballantine v. Central Railroad of New Jersey, 460 F. 2d 540 (3d Cir. 1972), cert. denied, 409 U.S. 879 (1972). As already noted, the release issue was clearly raised before the District Court and in any event, the District Court considered that issue in formulating its decision. [A-352a].

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* Brief of Defendants-Appellees, p. 20.

Defendants-Appellees rely on Browzin v. Catholic University of America, 527 F. 2d 843 (D.C. Cir. 1975) wherein, as to an issue concerning burden of proof, it was held that if appellant advised the District Court as to the alleged error, the District Court could have rectified the situation.

> "Appellant's failure to object, although he had ample opportunity to do so, precludes his raising the burden of proof issue here. See Rule 46, Fed. R. Civ. P." 527 F. 2d at 850.

It cannot be urged that LOCAFRANCE "failed to object" to the District Court's action regarding the release. [A-354a].

Mysteriously, Defendants-Appellees have quoted* from Steinhauser v. Hertz Corporation, 421 F. 2d 1169 (2d Cir. 1970), wherein this Court reversed the District Court's refusal to adopt a requested jury instruction. In quoting from Steinhauser, Defendants-Appellees have selectively omitted rather pertinent language. The entire quotation is as follows:

> "Defendants argue that, however all this may be, plaintiffs cannot be heard to complain because of the failure of their counsel to except to the charge and his statement that he has no objection to the judge's handling of the jury's question. This forgets that the purpose of the rule requiring objections is to prevent reversals and consequent new trials because of errors the judge might well have corrected if the point had been brought to his attention. Here counsel had made his position abundantly clear not only the colloquy we have cited but also in one of his requests to charge, and it was plain that further efforts would be unavailing. See Keen v. Overseas Tankship Corp., 194 F. 2d 515 (2 cir.), cert. denied, 343 U.S. 966, 72 S. Ct. 1061, 96 L. Ed. 1363 (1952)." 421 F. 2d at 1173. (Emphasis Added).

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* Brief of Defendants-Appellants, p. 22.

Had Defendants-Appellees considered the entire opinion it would have been clear that Steinhauser presented a situation, as in the case at bar, where the District Court had been made aware of appellant's position.

Clearly the further authorities cited by Defendants-Appellees involve situations where issues were undisputably never raised in the District Court. Accordingly, they are wholly inapplicable herein.

* Fortunato v. Ford Motor Co., 464 F. 2d 962 (2d Cir. 1972); Wilkerson v. Meskill, 501 F. 2d 297 (2d Cir. 1974); Schwartz v. S.S. Nassau, 345 F. 2d 465 (2d Cir. 1965).

POINT II

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING THE COMPLAINT AS TO ALL DEFENDANTS

As LOCAFRANCE has previously pointed out,* the District Court in dismissing the Complaint and granting summary judgment against all defendants relied exclusively on the existence of a release from LOCAFRANCE to INTERMODAL alone dated June 18, 1974 [A-104a]. LOCAFRANCE submits that the release is clearly ineffective with respect to the INDIVIDUAL DEFENDANTS named in this action and that the District Court's holding is reversible error.

Defendants-Appellees respond initially by stating that Illinois law is applicable. At the outset, the settlement agreement (of which the release in issue forms a part) upon which Defendants-Appellees have relied so strenuously to date, expressly provides in Paragraph "23" that:

> "This Agreement shall be construed and enforced in accordance with the laws of the State of New York." [A-43a].

Accordingly, Illinois law is inapplicable.

Defendants-Appellees further assert, almost ludicrously, that the "strong policy of the law against double recovery will bar the present action."** As LOCAFRANCE has previously pointed out (and without dispute by Defendants-Appellees) there has never

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* Brief of Plaintiff-Appellant, pp. 32-36.
** Brief of Defendants-Appellees, pp. 28-30.

been performance by INTERMODAL under the initial financing arrangements or the subsequent settlement agreement [A-153a; A-155a; A-207a]. In fact, the conduct of INTERMODAL raises a strong presumption that it never intended to perform the settlement agreement. [A-155a; A-206a]. Rather than having addressed the precise issue of the presumably inadvertent dismissal of the INDIVIDUAL DEFENDANTS, the Brief of Defendants-Appellees is replete with unjustified, irrelevant and untenable conclusory statements such as:

> "LOCAFRANCE offered no evidence to show that its claims on the old sale leaseback contracts were not completely satisfied by the settlement agreement."
>
> [p. 29, Brief of Defendants-Appellees]
>
> "Even if a release given to ISLI does not necessarily release the other defendants herein, the release of ISLI raises a presumption that LOCAFRANCE's claim has been satisfied."
>
> [p. 30, Brief of Defendants-Appellees]
>
> "In settling their disputes, LOCAFRANCE and ISLI rescinded the 1972 and 1973 sale leaseback contracts."
>
> [p. 31, Brief of Defendants-Appellees]

There is absolutely no authority or basis for such conclusory and improper statements of which the above few are merely illustrative.

This apparent reliance upon the double-recovery argument is misplaced by reason of the obvious and undisputed fact that the "alleged initial recovery" has not yet occurred. Accordingly,

the authorities cited in support of such a proposition* are inapplicable inasmuch as each case involves a situation where the putative plaintiff had already recovered and was, in fact, allegedly seeking a second recovery.

To the contrary, LOCAFRANCE has not obtained any recovery as against INTERMODAL, the financing arrangements have not been "voluntarily annulled and cancelled", and LOCAFRANCE has not "received the remedy of rescission", which, of course, would amount to a return of all monies invested by LOCAFRANCE in INTERMODAL. However inarticulate, Defendants-Appellees do nothing more than raise their prior argument as to an alleged accord and satisfaction, which doctrine is inapplicable in the case at bar.** General Obligations Law §15-501; American Broadcast, etc. v. American Mfrs. M.I. Co., 48 Misc. 2d 397, 265 N.Y.S. 2d 76 (Sup. Ct. N.Y. Co. 1965) aff'd 265 N.Y.S. 2d 577 (1st Dept. 1965), aff'd 17 N.Y. 2d 851, 271 N.Y.S. 2d 285 (1966) cert. denied, 385 U.S. 931 (1966). Goldbard v. Empire State Mutual Life Insurance Co., 5 A.D. 2d 230, 171 N.Y.S. 2d 194 (1st Dept. 1958).

Accordingly, there can be no basis for the granting of summary judgment as to the INDIVIDUAL DEFENDANTS even if LOCAFRANCE had executed an effective release with respect to INTERMODAL and the District Court's blanket dismissal was clearly erroneous.

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* Brief of Defendants-Appellees, p. 30.

** This argument is treated and refuted in LOCAFRANCE's memorandum of law in opposition to the motion to dismiss [A-170a through A-174a].

POINT III

THE AGREEMENT BETWEEN LOCAFRANCE AND INTERMODAL DATED JUNE 18, 1974 DID NOT SUPERSEDE ANY PRE-EXISTENT OBLIGATIONS AND/OR LIABILITIES

LOCAFRANCE has argued that the District Court erred in granting summary judgment dismissing the Complaint because the effect of the release presents issues of fact and because the District Court as a matter of law improperly construed the release. In response, Defendants-Appellees inaccurately state that LOCAFRANCE cited Blair & Co. v. Otto V., 5 A.D. 2d 276, 171 N.Y.S. 2d 203 (1st Dept. 1958) in LOCAFRANCE's memorandum of law in opposition to the motion to dismiss [A-171a] as supportive of LOCAFRANCE's position. Deceivingly, it is pointed out that despite LOCAFRANCE's citation thereof, Blair bolsters the contrary position. An accurate review of said memorandum of law reveals that it appears only because it is contained in a quote from the opinion in American Broadcast, etc. v. American Mfrs. M.I. Co., 48 Misc. 2d 397, 265 N.Y.S. 2d 76 (Sup. Ct. N.Y. Co. 1965) aff'd 265 N.Y.S. 2d 577 (1st Dept. 1965) aff'd 271 N.Y. S. 2d 285, 16 N.Y. 2d 851 (1966) cert. denied, 385 U.S. 931 (1966). [A-171a]. The American Broadcast case establishes that a subsequent agreement supersedes obligations under a prior agreement, only where that intent is expressly made clear by the parties. Where as here, no such intent is evident either expressly or impliedly, the American Broadcast case is dispositive and the Blair case inapplicable to the issue of supersession.

In their discussion of the Blair case, Defendants-Appellees omit to note that the parties executed a third agreement, (on the same day that the parties executed the second agreement), that, allegedly, superseded the original agreement. The allegedly superseding agreement provided as follows:

> "We refer to the [original agreement] to which you and ourselves were parties. This is to advise you that we no longer have any interest in such Agreement and shall not have any liability thereunder.
>
> Your approval at the foot hereof shall constitute an agreement to such effect between us." 5 A.D. 2d at 279.

The Court, in Blair, relied not on the second agreement in finding that the original agreement had been superseded, but rather stated that it would be possible to:

> ". . . agree with plaintiff Blair that only the "payments" rather than the promises thereof would satisfy the pre-existent obligation--if it were in fact true that the [second agreement] consisted of but one document making that slender reference. But the parties executed on the same date the [third] document as part of that agreement. Its language is clear and unmistakable. It cannot be ignored. It says, in so many words, that Blair no longer has any interest in the [original] agreement and, even more important, that it no longer has any liability thereunder." 5 A.D. 2d at 282.

In the case at bar, neither LOCAFRANCE nor INTERMODAL manifested any intention that any underlying obligations be extinguished or superseded nor was any document executed reflecting such intention. Accordingly, reliance on Blair is misplaced.

Reliance by Defendants-Appellees is also placed on Moers v. Moers, 229 N.Y. 294 (1920) for the proposition that a subsequent agreement supersedes the original agreement. As has already been noted, this is true, only if the parties expressly intended that to be the case. The Court in Moers stated:

> "It [the agreement] as a matter of law, makes manifest the intention of the parties that the original action and all disputes and controversies between them were merged into it." 229 N.Y. at 301, 302 (Emphasis Added).

See also, Langlois v. Langlois, 169 N.Y.S. 2d 170, 5 A.D. 2d 75 (3rd Dept 1957).

In Kromer v. Heim, 75 N.Y. 574 (1879), also relied on by Defendants-Appellees, the Court opined:

> "Where the performance of the new promise was the thing to be received in satisfaction, then, until performance, there is not complete accord; and the original obligation remains in force: (Russell v. Lytle, 6 Wend., 390; Daniels v. Hallenbeck, 19 id., 408; Hawley v. Foote, id., 516; The Brooklyn Bank v. DeGrauw, 23 id., 342; Tilton v. Alcott, 16 Barb., 598)." 75 N.Y. at 577.

See also Miller v. Jamaica Savings Bank, 377 N.Y.S. 2d 89, 50 A.D. 2d 865 (2d Dept. 1975).

Based on the reasoning in Kromer, until performance has been rendered on the new obligation, the original obligation remains intact.

Lazere Financial Corp. v. Crystal Mart, Inc., 357 N.Y.S. 2d 973, 78 Misc. 2d 379, (Civ. Ct. N.Y. Co. 1974), relied upon by Defendants-Appellees, where the Court decided that the Plaintiff, originally a holder in due course, lost his status after accepting a partial payment and a note for the remainder of the debt, is distinguishable from the instant case, in that, plaintiff was barred from asserting holder in due course status not because the prior agreement had been superseded but because it became aware of Defendant's defenses prior to the transfer of the subsequent promissory notes.

Accordingly, in the absence of a manifest intent to discharge and extinguish underlying obligations and in view of the undisputed non-performance by INTERMODAL of the agreement of June 18, 1974, LOCAFRANCE should not be barred from maintaining this action.

POINT IV

FACTUAL INACCURACIES EXIST IN DEFENDANTS-APPELLEES' BRIEF

Defendants-Appellees have advised this Court,* regarding LOCAFRANCE's reference to Cohen v. Tenney Corporation, 318 F. Supp. 280 (S.D.N.Y. 1970), that LOCAFRANCE

> "neglects to inform the court that this case was later modified on reargument on the precise point that plaintiff seeks to support."

Without belaboring this matter,** LOCAFRANCE specifically refers to Judge Tyler's original opinion, the motion for reargument, and quotes directly from Judge Tyler's modified opinion after reargument. Further, the Cohen opinion primarily addressed the issue of LOCAFRANCE's prejudice in not having the opportunity to present further evidence as to the circumstances surrounding the obtaining and execution of the release, rather than waiver pursuant to §29 of the Securities and Exchange Act (15 U.S.C. §78cc).

Further, Defendants-Appellees have completely distorted the events of November 4, 1976, at which time counsel first appeared before Judge Brieant for oral argument. Defendants-Appellees state that LOCAFRANCE's counsel first presented LOCAFRANCE's entire position*** before counsel for Defendants-Appellees had an opportunity to speak. As is the natural procedure when

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* Brief of Defendants-Appellees, p. 32.

** This, of course, unjustifiably ascribes to LOCAFRANCE some degree of alleged deceit.

*** Brief of Defendants-Appellees. p. 4.

counsel appears for oral argument in support of a motion, the moving party commences the argument, which is what actually occurred on November 4, 1976. Prior to LOCAFRANCE's counsel addressing the substantive issues raised by the moving papers, Judge Brieant criticized the movant's failure to identify the name of the trustee for several of the INDIVIDUAL DEFENDANTS. For that reason, it appeared, oral argument was adjourned until November 9, 1976 and not as Defendants-Appellees erroneously state, because the parties had nothing further to present. In fact, counsel for Defendants-Appellees was of an entirely different view on November 9, 1976 when Judge Brieant, after obtaining the identity of the trustee, was interrupted as follows:

> "THE COURT: I am not going to waste any more time on this point. I am going to make my findings on the record right now on this motion, and I am going to dispose of it.
>
> MR. ECHTMAN: Your Honor, the motion of course, covers points beyond --
>
> THE COURT: Won't you please let me speak and I'll hear you later, if it's necessary." [A-347a].

Further, Defendants-Appellees, in addition to fabricating a non-existant motion for reargument and then mysteriously responding to it,* assert, albeit without authority,

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* Brief of Defendants-Appelles, pp. 14-16.

that LOCAFRANCE waived any right to address the merits of the motion by not having interrupted Judge Brieant as he began to read his decision in open court. This ludicrous position is asserted despite the fact that Judge Brieant's opinion had previously been drafted.

Defendants-Appellees further impute to LOCAFRANCE some alleged misunderstanding of the meaning of the term parol evidence.* As has already been made clear in Point III of Plaintiff-Appellant's Brief, inasmuch as the District Court intended to rely solely on the release, LOCAFRANCE should have been permitted to establish by parol evidence that the effectiveness of the release was dependent upon INTERMODAL satisfying the condition precedent that it perform the terms and conditions of the settlement agreement and that the execution of the release was fraudulently induced by INTERMODAL. LOCAFRANE was never given this opportunity. Contrary to the mischaracterization of Defendants-Appellees, LOCAFRANCE sought and should have been given an opportunity, either at an evidentiary hearing or by submission of subsequent affidavits to establish the said condition precedent and, as well, the fraudulent inducement surrounding the release.

* Brief of Defendants-Appellees, p. 19.

CONCLUSION

By reason of the foregoing, it is respectfully requested that the Judgment entered in the District Court be reversed.

Respectfully Submitted,

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A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

FEDERAL COURT
SECOND CIRCUIT

Index No.

- against -

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 112 West 136th Street; New York, New York

That on the 28th *day of* March, *19* 77 *at* 6 East 39th Street New York, New York

deponent served the annexed *upon*

Easton & Echtman, Esqs.

Reply Brief

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 28th *day of* March, *19* 77

James A. Steele

James A. Steele

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977